IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 21, 2005 Session

STACY LEE MAYNOR v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Robertson County
No. 01-0478 Michael R. Jones, Judge

No. M2005-00574-CCA-R3-PC - Filed February 24, 2006

The petitioner appeals the denial of his petition for post-conviction relief, alleging ineffective assistance, and that his plea of nolo contendere was not knowingly and voluntarily entered. Following thorough review, we conclude that the evidence presented on appeal does not preponderate against the post-conviction court's findings and, therefore, affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Roger E. Nell, District Public Defender, and Charles S. Bloodworth, Assistant Public Defender (on appeal), and Michael A. Colavecchio, Nashville, Tennessee (at trial), for the appellant, Stacy Lee Maynor.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The petitioner, Stacy Lee Maynor, was indicted by a Robertson County Grand Jury on seven counts of rape of a child (a Class A felony). During a recess following opening statements at trial, the petitioner elected to plead nolo contendere to one count of rape of a child in exchange for a sentence of eighteen years at one hundred percent service. The petitioner subsequently filed a pro se petition for post-conviction relief alleging, inter alia, an unknowing and involuntary plea and ineffective assistance of counsel. After finding that the petition presented a colorable claim, the post-conviction court appointed counsel, and an evidentiary hearing was held on January 14, 2005.

The post-conviction court subsequently denied relief by written order issued February 1, 2005. The petitioner now timely appeals the denial of post-conviction relief to this court. Upon review of the record, briefs of the parties, and applicable law, we affirm.

At the post-conviction hearing, the petitioner testified that he dropped out of his Ft. Pierce, Florida high school in the first semester of his tenth grade year and that he has since not returned to school or obtained a GED. He stated that he did not understand what it meant to be subject to community supervision for life or the meaning of standardized sex offender treatment. Although he initially indicated that counsel explained that he would serve one hundred percent of his eighteen year sentence, he further stated that he did not understand his sentence. The petitioner testified that his statement to police was coerced and that he had little sleep prior to rendering the statement. He recalled that counsel unsuccessfully attempted to suppress the statement but was unable to remember whether he was informed that his plea operated as a wavier of his right to appeal the denial of the motion to suppress.

The petitioner stated that he met with counsel prior to trial and gave him a list of potential witnesses, which included the petitioner's mother. He further noted that his mother was not subpoenaed, despite the fact that he had informed counsel that she had information regarding an offer by the petitioner's wife to settle the case in exchange for a cash payment. Specifically, the petitioner testified that his wife indicated that she would not "push[] the issue" if he paid her $20,000. He indicated that his wife's offer stemmed from her knowledge of a $100,000 cash settlement he received as a result of a motorcycle accident.

The petitioner recalled that the victim was examined at "Our Kid's Clinic" in Nashville and that the results of the examination could neither confirm nor rule out the possibility of sexual contact. The petitioner also noted that he initially insisted on taking the case to trial. He stated that he could not recall whether counsel discussed consecutive sentencing with him but that he believed he could get "life in prison" if he proceeded to trial.

On cross-examination, the petitioner testified that he saw the victim and her sister on the day of trial. He reiterated that counsel informed him that, pursuant to his plea agreement, he would serve one hundred percent of eighteen years. Regarding community supervision for life, he indicated that it made sense that community supervision for life referred to reporting to a probation officer in your community for life. The petitioner acknowledged that he signed the Petition for Waiver of Trial by Jury and Request for Acceptance of Plea, which contained the terms of the plea agreement. He further admitted that he remembered "some of" the court's statements to him regarding the waiver of his right to appeal the trial court's ruling on the motion to suppress. The petitioner stated that he did not tell counsel everything he felt he should before trial. Finally, he stated that he was in the Intensive Care Unit (ICU) when his wife offered to settle the case and that he spent his settlement on, among other things, his attorney, cars, drugs, and trailers, because he "didn't want [his] wife touching a dime of it."

On redirect examination, the petitioner testified that he did not initially want to plea and that after he entered the plea, counsel told him that he had "been railroaded." He further stated that he was unsure of what nolo contendere meant and that he did not know that he was giving up his right to appeal. The petitioner indicated that he understood that the State only proceeded on four of the seven counts at trial and that the three dismissed counts could "come back to life," but noted that "[t]hat's the chance that [he had] to take."

Hershel Maynor, the petitioner's father, testified that he transported the petitioner from Arkansas to be questioned by police, a five-hour trip, and that the petitioner had been awake "quite a few hours" when he made his statement to police. He recalled that the petitioner initially wanted to go to trial but changed his mind when he saw that the victim's nine-year-old sister was present to testify. Maynor indicated that neither the petitioner nor counsel knew that the witness was going to testify until the day of trial. He testified that the petitioner took between forty-five minutes and one hour to decide that he was going to plead.

Maynor stated that the petitioner believed that he was the biological father of the victim and her sister but that DNA evidence eventually proved otherwise. He further indicated that he was not aware of whether the petitioner's wife made an offer to settle the case for a cash payment because he was not in the hospital room with them at that time. Maynor testified, however, that the petitioner's mother was in the room but was not presented as a witness on the petitioner's behalf at trial. On cross-examination, Maynor testified that the petitioner was aware that the victim and her sister were present at trial.

Counsel testified that he learned both that the victim's sister would be a witness and the substance of her testimony "[a] few weeks prior to trial." He further indicated that he had adequate time to prepare for trial; that he had copies of all pertinent documents; and that he was not aware of anything that the State should have provided that it did not. Counsel stated that the petitioner began asking about a plea after seeing the victim and her sister during a lunch recess. At that point, counsel began negotiating and reached a plea agreement approximately two hours later. He testified that the petitioner had ample time to consider the plea and that he did not force the petitioner to accept the offer. Counsel stated that he never felt that he and the petitioner suffered from a lack of communication due to the petitioner's limited education and further indicated that he believed the plea to be knowing and intelligent. He specifically noted that he explained to the petitioner that he would serve one hundred percent of the eighteen-year sentence with the possibility of credits reducing the sentence by fifteen percent.

Counsel testified that the trial court's findings of fact at the suppression hearing were conclusive and that it was reasonable for the petitioner to give up his right to appeal those findings. He further stated that he received the tape recording, which he was told contained an attempted bribe to drop the case. He recalled that the quality of the tape was poor and that he "never heard those words on [the tape]." Counsel indicated that he attempted to decipher the contents of the recording to see if any of it could be used in the petitioner's defense, but he was unable to find any beneficial information. He stated that he did not subpoena the petitioner's mother because, after speaking with

her, he did not feel that she had information that would aid the petitioner's case. Counsel testified that the report from the examination of the victim could neither confirm nor rule out sexual contact and further noted that there can be sexual penetration without attendant evidence. In sum, counsel stated that he believed he provided effective assistance of counsel.

On cross-examination, counsel testified that he was unaware of whether the victim had received funds from the Tennessee Criminal Injury Compensation Fund. He noted that he discussed the range of punishment and potential enhancing and mitigating factors with the petitioner. Counsel stated that he had contact with the petitioner's wife prior to trial and that he would have attacked her credibility had the case gone to trial. Following the hearing, the post-conviction court issued a written order denying post-conviction relief.

Analysis

I. Ineffective Assistance of Counsel

The petitioner first contends that counsel rendered ineffective assistance, in that the surprise appearance of the victim's sister as a witness led to an abrupt plea. When a claim of ineffective assistance of counsel is made under the Sixth Amendment, the petitioner bears the burden of proving that (1) counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). This standard has also been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). When a petitioner claims ineffective assistance of counsel in relation to a guilty plea or a plea of nolo contendere, the petitioner must prove that counsel performed deficiently and, but for counsel's errors, the petitioner would not have pled guilty but would have, instead, insisted upon going to trial. Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court required that the services be rendered within the range of competence demanded of attorneys in criminal cases. In reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; see Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002).

The petitioner bears the burden of proving by clear and convincing evidence the factual allegations that would entitle the petitioner to relief. T.C.A. § 40-30-210(f). This court is bound by the post-conviction court's findings of fact unless the evidence preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001).

In the present case, counsel testified that he had adequate time to prepare for trial and that he was aware of the victim's sister's testimony "[a] few weeks prior to trial." Counsel further stated that, although the petitioner had previously rejected plea offers, he asked counsel to seek a plea after seeing the victim and her sister during a lunch recess. In response, he began to negotiate a plea and reached an agreement with the State two hours later. Counsel indicated that he did not force the petitioner to plea and that he informed the petitioner that he would serve one hundred percent of eighteen years, with the possibility of credits reducing the sentence by fifteen percent.

Counsel testified that he listened to the audio tape given to him by the petitioner but determined that it was of poor quality and contained no information that was helpful to the defense. Counsel further stated that he did not subpoena the petitioner's mother because he did not feel that she would have been helpful to the defense. Based upon this evidence, we agree with the post-conviction court that counsel's performance was not deficient. Moreover, the petitioner has failed to demonstrate that, but for counsel's alleged error, he would not have pled nolo contendere but would have proceeded to trial. Therefore, having failed to meet either prong of the Strickland test, it is our determination that counsel did not render ineffective assistance.

II. Unknowing and Involuntary Plea

In addition to ineffective assistance of counsel, the petitioner claims that his plea of nolo contendere was not knowing or voluntary. A post-conviction petitioner may successfully attack a conviction when their guilty plea[1] was unknowing or involuntary. See T.C.A. § 40-30-103 (2001); Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969); State v. Wilson, 31 S.W.3d 189, 194 (Tenn. 2002). A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine whether the guilty plea is "knowing" by questioning the defendant to make sure he or she fully understands the plea and its consequences. State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999); Blankenship, 858 S.W.2d at 904.

Because the plea must represent a voluntary and intelligent choice among alternatives available to the defendant, the trial court may look at a number of circumstantial factors in making this determination. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant's relative intelligence; (2) his or her familiarity with criminal proceedings; (3) whether he or she was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

[1] This court has previously held that the voluntariness of a plea of nolo contendere is analyzed under the same standards as a plea of guilt. See Reece Calloway Loudermilk v. State, No. E2001-03060-CCA-R3-PC, 2002 Tenn. Crim. App. LEXIS, at *10 (Tenn. Crim. App., at Knoxville, Sept. 3, 2002).

The petitioner contends, inter alia, that he was not made aware of the nature of the charge, as the trial court did not mention the age of the victim or use the words penis or penetration.[2] While these are certainly elements of the offense that a defendant should be made aware of as per Tennessee Rule of Criminal Procedure 11(c)(1), the sole fact that the trial court did not include them in the plea colloquy does not necessarily render the plea infirm. Indeed, "a reviewing court may be able to determine that a defendant gained from other sources an adequate understanding of the offense and notice of the nature of the charge to which he or she is entering a plea, even if a trial court fails to comply with Rule 11(c)(1)." State v. Crowe, 168 S.W.3d 731, 750 (Tenn. 2005). In the present case, the factual basis and nature of the offense were noted in both the indictment and the prosecutor's opening statement at trial; therefore, the petitioner gained understanding of the charges from alternate sources.

Furthermore, a review of the transcript of the plea proceedings in this case reveals that the petitioner was informed of and waived his rights against self-incrimination, to a jury trial, and to confront and cross-examine witnesses. The petitioner indicated that he had sufficient time to discuss the plea agreement with counsel and that he understood the agreement and the trial court statements. Additionally, the trial court informed the petitioner that he would be subject to community supervision for life, and the petitioner indicated on cross-examination that he understood the plain meaning of those terms. Finally, he stated that he did not have any questions about the plea. For these reasons, we conclude that the petitioner's plea was knowingly and voluntarily entered, and we affirm the denial of post-conviction relief.

Conclusion

Based upon the foregoing, the denial of post-conviction relief is affirmed.

JOHN EVERETT WILLIAMS, JUDGE

[2] At the plea hearing, the district attorney made the following summation:

> The Witness would testify that [sic] in March of 2000, while she was living at 4210 Highway 49 West, in Springfield and while [the petitioner] was still in the household that her mother was in the hospital having surgery, was in the hospital for the purpose of having surgery, and that on that occasion, there was one event of fellatio.